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Mohd Johari bin Awang v Aneka Prestij Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS T-02(NCVC)(W)-1076–05 OF 2013 AND T-02(NCVC)(W)-1085–05 OF 2013
MOHAMAD ARIFF, MAH WENG KWAI AND DAVID WONG JJCA
18 APRIL 2014

Contract — Illegality — Unlawful consideration — Government project awarded to private company — Company tasked individual to secure subcontractor for project — Appointed subcontractor required to pay 'consultancy fees' to company and individual in consideration for appointment — Whether arrangement to pay 'consultancy fees' illegal and contravened s 24 of the Contracts Act 1950 — Whether 'public' element in project disappeared once government project became privately-owned — Whether contract to earn commission legal unless tainted by corruption or other form of illegality — Whether contract unlawful

A private company, RME Sdn Bhd ('RME') had obtained a government project and sought help from the appellant, Mohd Johari bin Awang, to secure a subcontractor to carry it out. The appellant discussed the matter with the respondent, Aneka Prestij Sdn Bhd, and it was the appellant's contention that if RME appointed the respondent as the subcontractor the latter would pay a consultancy fee of RM6.3m comprised of RM3.3m to the appellant and the balance to RME. The respondent gave the appellant five post-dated cheques for RM3.3m but only RM2.7m of that amount was paid. The appellant sued for the balance RM600,000 in the High Court. The respondent counterclaimed for RM700,000 contending that the appellant had been overpaid in that amount. The respondent's case was that the appellant fraudulently represented the total consultancy fee to be RM6.3m when, in fact, it was only RM5m and that since RM3m had already been paid to RME, only RM2m was due to the appellant. The High Court dismissed both the claim and the counterclaim holding that the arrangement for payment of the consultancy fee was illegal and contravened s 24 of the Contracts Act 1950 ('Act') and, in particular, that the factual matrix fell within illustration (f) under that section. The court also held the appellant had acted in bad faith. The issues in the instant appeal against that decision was whether s 24 of the Act applied to the facts of the case and which one of the respective version of events of the parties was the more credible.

Held, allowing the appellant's appeal and dismissing the respondent's cross-appeal:

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(1) Once the project was awarded to a private enterprise, whatever agreement reached by the parties in the private sector was pure and simple a business agreement. The project might have been a government project, but once RME became the owner of that project, any so-called 'public' element disappeared. The High Court therefore misapplied the principles embodied in s 24 of the Act (see para 17).

(2) A contract to earn commission was perfectly legal unless it was tainted by some form of illegality such as corruption. A promise to secure a contractor was nothing but the manner in which business was conducted in the private sector and it was not the court's duty to regulate such behaviour except when it was forbidden by law. In the instant case, there was no illegality or prohibition (see paras 18 & 22).

(3) The respondent's allegation of fraud suffered from the fatal flaw that relevant witnesses were not called to testify in support of it. The respondent also did not dispute that it was required to pay some commission for securing the contract. The dispute was simply on the amount payable. The documentary evidence showed the cheques that had been given to the appellant. At no time prior to the suit did the respondent demand for the return of the so-called overpayment of RM700,000 while payment on the last cheque was not stopped even after it was allegedly told the actual amount of consultancy fee payable was only RM5m. The reasonable inference from the respondent's conduct and the existence of the cheques was simply that the appellant's version of events was the more probable one (see paras 19–21).

[Bahasa Malaysia summary

Syarikat persendirian, RME Sdn Bhd ('RME') telah memperolehi projek kerajaan dan memohon bantuan daripada perayu, Mohd Johari bin Awang, untuk mendapatkan subkontraktor untuk menjalankannya. Perayu membincangkan perkara dengan responden, Aneka Prestij Sdn Bhd, dan ia adalah hujahan perayu bahawa jika RME melantik responden sebagai subkontraktor responden akan membayar fi pakar runding sebanyak RM6.3 juta terdiri daripada RM3.3 juta kepada perayu dan baki kepada RME. Responden memberi kepada perayu lima cek lepas tarikh untuk jumlah RM3.3 juta tetapi hanya RM2.7 juta jumlah tersebut dibayar. Perayu menyaman untuk baki sebanyak RM600,000 di Mahkamah Tinggi. Responden menuntut balas untuk RM700,000 berhujah bahawa perayu telah terlebih bayar dalam jumlah tersebut. Kes responden adalah bahawa perayu secara fraud mengemukakan fi pakar runding sebanyak RM6.3 juta, apabila sebenarnya, ia adalah hanya RM5 juta dan bahawa memandangkan RM3 juta telah dibayar kepada RME, hanya RM2 juta yang kena dibayar kepada perayu. Mahkamah Tinggi menolak kedua-dua tuntutan dan tuntutan balas dengan memutuskan bahawa penyusunan untuk bayaran fi pakar runding adalah menyalahi undang-undang dan bertentangan s 24 Akta Kontrak 1950 ('Akta') dan,

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terutamanya, bahawa matriks fakta terangkum dalam ilustrasi (f) di bawah seksyen tersebut. Mahkamah juga memutuskan bahawa perayu telah bertindak tidak jujur. Isu-isu dalam rayuan ini terhadap keputusan adalah sama ada s 24 Akta diguna pakai kepada fakta kes dan yang mana satu versi kejadian pihak-pihak masing-masing yang lebih dipercayai.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan balas responden:

(1) Sebaik saja projek diawardkan kepada syarikat persendirian, apa-apa perjanjian yang diputuskan oleh pihak-pihak dalam sektor persendirian adalah perjanjian perniagaan yang jelas dan ringkas. Projek mungkin adalah projek kerajaan, tetapi apabila RME menjadi pemilik projek tersebut, apa-apa yang dikatakan unsur 'public' hilang. Mahkamah Tinggi oleh itu menyalah guna prinsip-prinsip yang terdapat di dalam s 24 Akta (lihat perenggan 17).

(2) Kontrak untuk mendapatkan komisyen adalah sah di sisi undang-undang kecuali ia dicemari oleh apa-apa bentuk yang menyalahi undang-undang seperti rasuah. Janji untuk mendapatkan kontraktor adalah perkara biasa tetapi cara dalam mana perniagaan dilakukan di dalam sektor persendirian dan adalah bukan tugas mahkamah untuk mengawal perlakuan sedemikian kecuali apabila ia dilarang oleh undang-undang. Dalam kes ini, tidak terdapat kepenyalahan undang-undang atau larangan (lihat perenggan 18 & 22).

(3) Dakwaan fraud responden yang dialami daripada kecacatan tersebut bahawa saksi-saksi relevan tidak dipanggil untuk memberi keterangan untuk menyokongnya. Responden juga tidak mempertikaikan bahawa ia dikehendaki membayar komisyen untuk mendapatkan kontrak tersebut. Pertikaian hanya atas jumlah untuk dibayar. Keterangan dokumentar menunjukkan cek-cek telah diberikan kepada perayu. Tidak pada bila-bila masa sebelum tindakan guaman responden menuntut untuk bayaran balik bayaran lebihan sebanyak RM700,000 sementara bayaran ke atas cek terakhir tidak diberhentikan walaupun ia telah didakwa memberitahu jumlah sebenar fi pakar runding hanya RM5 juta. Inferens munasabah daripada tingkah laku responden dan kewujudan cek-cek hanya bahawa versi kejadian perayu adalah satu yang lebih dipercayai (lihat perenggan 19–21).]

Notes

For a case on unlawful consideration, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5339.

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Cases referred to

Armagas Ltd v Mundogas SA The Ocean Fros [1985] 1 Lloyd's Rep 1, QBD (folld)

PP v Dato' Saidin bin Thamby [2012] 3 MLJ 476; [2012] 4 CLJ 15, CA (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (folld)

Legislation referred to

Contracts Act 1950 s 24

Appeal from: Suit No 22NCVC-18–12 of 2011 (High Court, Kuala Terengganu)

Karamjit Singh a/l Harbajan Singh (Bhadarul Baharain & Partners) for the appellant.

Ahmad Musthafi bin Mohamad (Ahmad Musthafi & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us. One appeal relates to the decision of the High Court in which the learned judge dismissed the appellant/plaintiff's claim against the respondent/defendant for consultancy fees of RM600,000. The other appeal relates to the dismissal of the respondent/defendant's counterclaim for a payment of RM700,000 made pursuant to an alleged fraudulent misrepresentation by the appellant/plaintiff.

[2] We heard the appeals and after due consideration to the respective submissions of counsel, we allowed the appellant's appeal relating the claim of RM600,000 but dismissed the respondent's appeal relating to the counterclaim of RM700,000.

[3] The respondent has recently applied for leave to appeal to the Federal Court. We now give our reasons for our decision.

THE DISPUTE

The appellant's version

[4] The appellant was approached by RME Sdn Bhd ('RME') to help them to source for a contractor willing to perform works in respect of a project in the State of Terengganu. The worth of the project is in the sum of RM45,952,264.40.

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[5] The appellant pursuant to that request from RME approached the respondent concerning the project and had informed the respondent that in the event that RME appoints them as the contractor of the Terengganu project, they are required to pay a consultancy fee of RM6,300,000.

[6] The payment of the RM6.3m is to be in following manner:

(a) RM3.3m to be paid as an initial payment to the appellant;

(b) The balance of RM3m to be paid to RME by way of instalments during the construction of the project.

[7] In respect of the RM3.3m, the respondent had given five post-dated cheques to the appellant, particulars as follows:

No	Payment Voucher	Dated	Cheque Number	Amount
1	AP 10169	12-10-2010	MBB 647248	RM1,000,000
2	AP 10169	12-10-2010	MBB 647249	RM500,000
3	AP 10169	12-10-2010	MBB 647250	RM500,000
4	AP 10190	26-10-2010	MBB 653863	RM600,000
5	AP 10190	26-10-2010	MBB 653864	RM700,000
				RM3,300,000

[8] Four cheques amounting to RM2.7m were deposited by the appellant and were cleared. The remaining cheque of RM600,000 was not deposited on the instruction of the respondent. That cheque had since lapsed and become invalid.

[9] The appellant demanded from the respondent to pay the sum of RM600,000 which the respondent refused to do, resulting in this claim by the appellant.

The respondent's version

[10] As mentioned earlier, the respondent had filed a counterclaim against the appellant for the sum of RM700,000. The circumstance giving rise to this counterclaim is this.

[11] According to the respondent, the appellant had represented to the respondent that the sum of RM6.3m is to be paid to RME when in fact RME had only requested for the sum of RM5m. This representation according to the respondent is fraudulent and it is upon this premise that the counterclaim is made.

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[12] It is undisputed that the respondent had made payment amounting to RM5.7m which is made up of the RM3m paid direct to RME plus the sum RM2.7m paid to the appellant via the above mentioned four cheques. Bearing in mind that the respondent's contention that RME had only requested an amount of RM5m, there is thus an overpayment of RM700,000 which forms the respondent's counterclaim.

High Court decision

[13] The learned judge after reviewing the totality of the evidence came to the conclusion that the arrangement in which the appellant, respondent and RME entered into in respect of the payment of the so called 'consultancy fee' contravenes s 24 of the Contracts Act which reads as follows:

> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> *ILLUSTRATIONS*
>
> (f) A promises to obtain for B an employment in the public service, and B promises to pay RM1,000 to A. The agreement is void, as the consideration for it is unlawful.

[14] The learned judge also found that the appellant acted in bad faith. Premised on a breach of s 24 of the Contracts Act and bad faith of the appellant, the learned judge dismissed the appellant's claim and also dismissed the respondent's counterclaim. The learned judge's reasonings in his words are these:

> Dalam keadaan ini say a mendapati bahawa wujud unsur mala fide di pihak Plaintif dan transaksi yang dijalankan dengan Defendan telah dibuat dengan niat tidak balk (not in good faith). Makanya, jawapan saya terhadap tuntutan Plaintif adalah negatif bergantung kepada peruntukan Seksyen 24 Akta Kontrak 1950, misalan (f).
>
> Saya juga mendapati keputusan kes yang dirujuk oleh peguam Plaintif dalam kes *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 tidak terpakai dalam konteks kes dihadapan saya. Dalam kes ini Hakim Gopal Sri Ram yang bersidang sebagai Mahkamah Rayuan telah menyatakan:

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[1] Ianya bukan dan tidak pernah menjadi undang-undang dalam negara ini bahawa untuk meyokong suatu perjanjian, balasan mesti disempurnakan. Balasan dalam bentuk perlaksanaan juga memadai.

[2] Di sini terdapat janji yang dibuat oleh responden bahawa beliau akan membantu mendapatkan kelulusan yang diperlukan untuk penukaran dan pecahbahagian tanah. Perayu telah berjanji akan membayar responden sebanyak RM 268,888 untuk perkhidmatan itu. Secara ab initio, terdapat janji untuk suatu janji dan ini adalah balasan yang baik di sisi undang-undang.

[3] Responden telah membuat suatu untuk mendapatkan sokongan Menteri Besar terhadap permohonan syarikat tersebut dan kelulusan telah diperolehi. Jadinya, responden telah *delivered the goods*.

Walau bagaimanapun, fakta kes dihadapan saya adalah berbeza di mana perjanjian untuk bayar perkhidmatan bagi mendapatkan balasan yang lain tidak dimulakan oleh Defendan. Pihak RME Sdn Bhd yang terlebih dahulu meminta Plaintif mendapatkan subkontraktor bagi menjalankan projeknya yang mana telah ditawarkan kepada Defendan dengan harga yang melebihi nilai kontrak yang sebenar oleh Plaintif.

Kedua, walaupun Perjanjian Subkontrak tersebut bernilai RM 5 juta sahaja, Defendan perlu membuktikan kepada mahkamah di tahap prima facie bahawa Plaintif telah melakukan representasi palsu/frod dan memperdaya beliau untuk membuat bayaran sebanyak RM 3.3 juta, yang mana telah tidak dibuktikan oleh Defendan. Pengakuan *SD1* bahawa RME telah menerima RM 2 juta untuk bayaran kontrak tersebut tidak secara nyata membolehkan Defendan mendapatkan semula lebihan wang yang dibayar kepada Plaintif berjumlah RM 700,000 memandangkan bayaran tersebut telah dibuat secara sukarela oleh Defendan.

Selain itu, saya mendapati bahawa keadaan ini berlaku berpunca dan kecuaian/kelalaian atau tinggalan Defendan sendiri yang telah memajukan bayaran kontrak tersebut kepada Plaintif sebelum perjanjian subkontrak dimasuki dengan pihak yang relevan, iaitu RME Sdn Bhd.

Saya merujuk kepada keputusan Mahkamah Rayuan dalam kes *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2013] 1 MLJ 597 yang menegaskan:

> keseluruhan perjanjian menjadi perjanjian tidak sah dalam ertikata Seksyen 24 Akta Kontrak. Memandangkan keseluruhan transaksi dicemari dengan ketaksahan, instrument lain yang berkaitan juga turut dicemari dengan ketaksahan.

Dalam kes di atas, Defendan telah menggunakan Chin bagi mendapatkan tanah anak watan Sabah bagi pihaknya dan urusan pembelian tanah tersebut telah diluluskan oleh pihak Plaintif. Setelah mengetahui transaksi adalah bersalahan dengan Ordinan Tanah Sabah, Plaintif menfailkan tuntutan bagi mendapatkan semula wang yang telah dipinjamkan kepada Defendan di bawah Seksyen 66 Akta Kontrak 1950 tetapi telah ditolak oleh Mahkamah atas sebab 'ketaksahan'.

Our grounds of decision

[15] In our view there are two determinative issues which are these:

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(a) Whether s 24 of the Contracts Act is applicable to the arrangement made between the parties?

(b) Which version of the events is more credible?

Section 24 of the Contracts Act

[16] From the pleadings and the manner in which the evidence was tendered in Court, the applicability of s 24 was not an issue argued by the respective parties. In fact it was the learned judge on his own volition who had applied s 24 of the Contracts Act presumably on the ground of the so called consultancy agreement being tainted with illegality and as such the learned judge felt that he was entitled to take cognizance of it irrespective whether or not it was pleaded or argued. We have no issue with the approach taken by the learned judge.

[17] However and with respect, we are unable to see how s 24 is applicable to the factual matrix of this appeal. This dispute concerns a claim for consultancy fees agreed to by the respective parties and RME which is a private company which had obtained a government project and had sought the help from the appellant to look for someone to execute the works and manage the construction of the project. Once the project is awarded to a private enterprise, whatever agreement reached by parties in the private sector is pure and simple a business agreement. How that agreement can have any 'public' element, we are unable to see. The project may be a government project but like we said once RME is the owner of that project, any so called 'public' element disappears. Hence we find that the learned judge misapplied the principles embodied in s 24 of the Contracts Act.

[18] Before we leave this issue, this court has held that earning a commission per se is not forbidden by law unless it is earned in a form of a bribe. In *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ 476; [2012] 4 CLJ 15 this court states as follows:

> There is nothing wrong in making a commission. It has been sanctioned by this court in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 (CA). In that case, there was an application by the appellant to convert and subdivide the land. The respondent promised to assist in obtaining approval of the application. In return, the appellant promised to pay the respondent RM268,888 for that service. That consideration, namely the exchange of mutual promises, although executory, was held to be a good consideration. It was also held that there was a binding agreement between the parties. It was further held that the submission that the respondent did nothing to earn his fee was unmeritorious. The respondent had expended his exertions in securing the Menteri Besar's support for the appellant company's application, and the application had in fact been approved. It was held that the respondent's actions came within the terms of *s 2(d) of the*

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> *Contracts Act 1950* which provides that when the promisee has done something at the desire of the promisor, such act is a consideration for the promise.

Hence, we disagree with the learned judge that the case of *Wong Hon Leng David*'s case was not relevant to the case before us. The principle there is simple and it is this. A contract to earn commission is perfectly legal unless it is tainted by some form of illegality such as corruption. In this case as we said earlier, there is no such illegality.

Which version is more credible?

[19] The main complaint of the respondent is that it was informed by Amirnordin bin Samsudin and Hanif in March 2011 that RME in fact only requested a sum of RM5m and not RM6.3m as requested by the appellant. Hence the allegation of fraud by the appellant. That allegation suffers the fatal flaw that these two persons were never called as witnesses to testify on that allegation. Further the respondent's own witness from RME never confirmed that allegation except to confirm that the appellant is entitled to commission though how much was not mentioned.

[20] Further there is no dispute by the respondent that it was required to pay some commission for getting the contract works for the project. The only dispute is simply the amount payable. In resolving this dispute we apply the approach set out in the case of *Armagas Ltd v Mundogas SA The Ocean Fros* [1985] 1 Lloyd's Rep 1 at p 37:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[21] Applying the above approach, the documentary evidence is simply in the form of the cheques given to the appellant. Prior to this suit at no time did the respondent demand for the so called overpayment of RM700,000 from the appellant. Further as pointed out by learned counsel for the appellant, the respondent did not stop the last cheque prior to its expiry in April 2011 even after they were allegedly told in March 2011 that the actual amount payable is only RM5m to RME. The reasonable inference from the conduct of the respondent and the existence of the cheques is simply that the appellant's version of events is the more probable one.

[22] The allegation of bad faith even if proved does not with respect advance the respondent's contention. It is neither here nor there. A promise to secure a contractor like stated earlier is nothing but the manner in which business is

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conducted in the private sector and it is not the court's duty to regulate their behaviour except when it is forbidden by law. Here we see no such prohibition.

CONCLUSION

[23] Accordingly we allow the appeal of the appellant and allow paras 13(a) and (b) of the statement of claim. As for the cross-appeal of the respondent, it is dismissed. We award costs in the sum of RM40,000 for both the appeal and cross-appeal. We also order that the deposits to be refunded.

Appellant's appeal allowed and respondent's cross-appeal dismissed.

Reported by Ashok Kumar